

STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION

LAZ PARKING LTD, LLC	)	
Petitioner,	)	
	)	
And	)	
	)	
COMMONWEALTH EDISON COMPANY	)	Docket No. 12-0324
Respondent.	)	
	)	
	)	

**LAZ PARKING’S MOTION TO STRIKE PORTIONS OF  
COMED’S MOTION FOR SUMMARY JUDGMENT AND SUPPORTING AFFIDAVITS,  
AND TO STRIKE THE SCHEDULE FOR SAME**

In its Motion for Summary Judgment filed on June 30, 2015 (ComEd’s “Motion for Summary Judgment”), Respondent ComEd has presented the Illinois Commerce Commission (the “Commission”) with a pleading that still contains most of the problems that plagued its earlier motions to dismiss, and therefore Petitioner LAZ Parking moves the Commission to strike portions of ComEd’s Motion for Summary Judgment, portions of ComEd’s supporting affidavits, and the schedule previously set for briefing ComEd’s Motion for Summary Judgment. The grounds for this Motion are as follows:

**I. Background**

On May 2, 2012, LAZ Parking LTD, LLC (“LAZ Parking”) filed its complaint (the “Complaint”) against Commonwealth Edison Company (“ComEd”) to recover \$259,938 wrongfully back-billed to LAZ Parking by ComEd. The Complaint as originally filed stated five counts. ComEd claimed that LAZ Parking had been billed with an incorrect meter constant, resulting in alleged under-billing of LAZ Parking’s account. (Complaint, Exhibit D). However,

ComEd failed to comply with the accuracy and testing requirements set forth in Part 410 of the Rules of the Illinois Commerce Commission (the “Commission”), and therefore ComEd’s adjustment of its bills to LAZ Parking is unlawful under 83 Ill. Adm. Code Section 410.200(h)(1). (Complaint, Count II).

LAZ Parking served ComEd with discovery in July 2012. LAZ Parking had issues with ComEd’s responses to discovery, and, pursuant to Supreme Court Rule 201(k) and Commission Rule 200.350, from August through early October 2012, LAZ Parking repeatedly requested ComEd to schedule a telephone conference to discuss these discovery issues. ComEd uniformly ignored each of these requests. (See LAZ Parking’s Reply in Support of Motion to Deem Admitted, Exhibits A through D).

On October 5, 2012, LAZ Parking served ComEd with its First Set of Requests for Admission (the “Requests for Admission”). On October 31, 2012, ComEd served on LAZ Parking its responses to the Requests for Admission. On November 12, 2012, LAZ Parking filed its Motion to Deem Admitted Certain Facts Pursuant to Requests for Admission and Responses Thereto (the “Motion to Deem Admitted”). Only after LAZ Parking filed the Motion to Deem Admitted did ComEd finally confer with LAZ Parking by telephone regarding discovery issues (November 16, 2012). ComEd filed its Response in Opposition to LAZ Parking’s Motion to Deem Admitted on December 17, 2012.

On June 10, 2013, ComEd filed its “Motion to Dismiss Complaint on the Merits” (ComEd’s “First Motion to Dismiss”).

On June 13, 2013, the Administrative Law Judge (the “ALJ”) ruled that ComEd’s First Motion to Dismiss would be held in abeyance pending resolution of LAZ Parking’s Motion to Deem Admitted.

Oral argument on the Motion to Deem Admitted was held on June 28, 2013.

At a status hearing held on December 4, 2013, Complainant moved to voluntarily dismiss Counts I, III, and IV from the Complaint. Counts II and V remain.

On February 13, 2014, the ALJ issued a ruling granting LAZ Parking's Motion to Deem Admitted, a copy of which is attached as Exhibit A hereto.

On February 14, 2014 LAZ Parking filed its Motion to Strike ComEd's First Motion to Dismiss. On February 20, 2014, the ALJ struck the briefing schedule on ComEd's First Motion to Dismiss pending resolution of the Motion to Strike ComEd's First Motion to Dismiss.

On February 27, 2014, ComEd filed its Motion to Reconsider (ComEd's "Motion to Reconsider") ALJ's Ruling granting LAZ Parking's Motion to Deem Admitted. On February 28, 2014, the ALJ issued a ruling holding in abeyance the briefing schedule on the Motion to Strike ComEd's First Motion to Dismiss and establishing a briefing schedule on ComEd's Motion to Reconsider, which was subsequently fully briefed.

On March 9, 2015, the ALJ entered an order denying ComEd's Motion to Reconsider and granting ComEd leave to file an amended motion to dismiss.

On April 30, 2015 ComEd filed its Amended Motion to Dismiss on the Merits (ComEd's "Second Motion to Dismiss").

On May 14, 2015, LAZ Parking filed its Motion to Clarify, to Strike and To Continue Generally the Hearing on ComEd's Amended Motion to Dismiss (LAZ Parking's "Motion to Clarify and Strike"). LAZ Parking's Motion to Clarify and Strike had three chief points. First, ComEd's Second Motion to Dismiss was legally unintelligible because it was a hybrid motion that jumbled together elements of a motion to dismiss for failure to state a claim with elements of a motion for summary judgment in contravention of Illinois Code of Civil Procedure Section 2-

619.1. Second, ComEd's Second Motion to Dismiss impermissibly sought to place in controversy its judicial admissions made under Illinois Supreme Court Rule 216 ("Rule 216"). Third, the affidavits that ComEd had submitted in support of its Second Motion to Dismiss were fatally deficient in numerous respects.

On May 29, 2015, a status hearing in this Docket was held at the Commission's offices. As of the date of that status hearing, both ComEd's Second Motion to Dismiss and LAZ Parking's Motion to Clarify and Strike that motion were pending. Attached to this Motion as Exhibit B is a copy of the transcript of that status hearing as docketed by the Commission. After some discussion of the pending motions, ComEd agreed that by June 8, 2015, ComEd would decide whether it was going to stand by its Second Motion to Dismiss and file a response to the Motion to Clarify and Strike, or whether it would file an amended motion to dismiss. In either case, ComEd's reply to the Motion to Clarify and Strike, or its amended motion to dismiss, would be due on June 30, 2015. On June 8, 2015, ComEd's counsel emailed a notice that ComEd would be filing an amended motion to dismiss.

On June 30, 2015, ComEd filed its Motion for Summary Judgment (ComEd's "Motion for Summary Judgment").

## **II. ComEd's Motion for Summary Judgment**

ComEd evidently hoped that its Motion for Summary Judgment would save it the trouble of responding to LAZ Parking's Motion to Clarify and Strike while repeating most of the same flaws that were in its Second Motion to Dismiss. Despite the full briefing of LAZ Parking's Motion to Deem Admitted, despite several hours of oral argument on ComEd's Rule 216 admissions on June 28, 2013, despite the ALJ's ruling on February 13, 2014 that granted LAZ Parking's Motion to Deem Admitted, despite the full briefing of ComEd's Motion to Reconsider

the Rule 216 admissions, and despite the ALJ's denial of ComEd's Motion to Reconsider, ComEd's Motion for Summary Judgment is nothing less than an attempt to re-litigate these issues.

In its Motion for Summary Judgment, ComEd simply parrots its earlier arguments, all of which have been rejected by the ALJ, namely, that:

- LAZ Parking's Motion to Deem Admitted "complicated the Record" with a set of [Rule 216] admissions (pg. 2);
- LAZ Parking obtained these admissions by "convincing the ALJ - despite ComEd's timely answers in opposition to certain of LAZ Parking's statements – the hyper-technical requirements of this Court [*sic*] were better than the Commission's own rule on the subject of requests to admit, i.e., 200.410 (pg. 2);
- "Rule 216 admissions are a new and novel thing at the Commission" (pg. 2, fn. 2);
- "[E]ven the Illinois Supreme Court does not favor Rule 216's harsh application" (pg 2, fn. 2);
- ComEd made valiant "efforts to save Commission Rule 200.410 from becoming a nullity or, alternatively, gain leave and direction to have its responses satisfy the court rule" (pg 2, fn. 2);
- "Thus, [the Commission] will reject outright those "admissions" that muddle the record with technically illogical and untrue statements."

Compounding matters, ComEd also devotes the entirety of Section IV of its Motion for Summary Judgment (pages 19 through 30) to re-litigating its Rule 216 judicial admissions. ComEd apparently can't be bothered with either the ALJ's ruling granting LAZ Parking's Motion to Deem Admitted, nor with the ALJ's ruling denying its Motion to Reconsider.

Worse, ComEd's Motion for Summary Judgment is flatly contrary to what ComEd agreed to do at the May 29, 2015 status hearing, i.e., either respond to the Motion to Clarify and Strike and stand on its Second Motion to Dismiss, or file an amended motion to dismiss that did

not repeat the problems of that motion. ComEd's Motion for Summary Judgment displays yet again its proclivity for writing its own procedural rules, regardless of what the Commission, the Illinois General Assembly, or the Illinois Supreme Court might have to say on the matter through rulings, statutes or procedural rules.

### **III. Motion to Strike Portions of ComEd's Motion for Summary Judgment**

ComEd's Motion for Summary Judgment amounts to a dodge of LAZ Parking's Motion to Clarify & Strike, and is expressly contrary to the understandings the parties reached in conference with the ALJ at the status hearing on May 29, 2015. That the ALJ has already ruled on ComEd's judicial admissions – twice – evidently isn't good enough for ComEd, and in its Motion for Summary Judgment, ComEd tries to place those judicial admissions in controversy once again. This violates both the ALJ's two rulings in this case as well as Supreme Court Rule 216.

An admission pursuant to a request to admit facts operates as a judicial admission that is considered incontrovertible and has the effect of withdrawing that fact from contention. *Moy v. Ng*, 341 Ill. App.3d 984, 988, 793 N.E.2d 919, 924 (1st Dist. 2003), appeal denied, 206 Ill.2d 624, 806 N.E.2d 1067, on remand 2004 WL 5584441. Admissions made pursuant to a request to admit are tantamount to judicial admissions and as such are taken as true. *Hoover v. Country Mut. Ins. Co.*, 363 Ill. Dec. 612, 619, 975 N.E.2d 638, 645 (Ill. App. 1st Dist. 2012). Admissions pursuant to requests to admit constitute judicial admissions, which are binding upon the party making them; they may not be controverted at trial or in a motion for summary judgment, and only in extraordinary circumstances may a party escape the consequences of a judicial admission. M. Graham, *Cleary & Graham's Handbook of Illinois Evidence* § 802.11, at 779 (7th ed. 1999), cited with approval in *Ellis v. American Family Mut. Ins. Co.*, 750 N.E.2d 1287, 1290,

255 Ill. Dec. 902, 905, 322 Ill. App.3d 1006, 1010 (Ill. App. 4th Dist. 2001). Admission through request to admit operates as judicial admission which is binding and is considered incontrovertible. *People v. Mindham*, 192 Ill. Dec. 680, 253 Ill. App.3d 792, 625 N.E.2d 835 (2nd Dist. 1993), appeal denied, 202 Ill. Dec. 927, 156 Ill.2d 563, 638 N.E.2d 1121.

Supreme Court Rule 216(c) provides, in relevant part, as follows:

Rule 216. Admission of Fact or of Genuineness of Documents

...

**(c) Admission in the Absence of Denial. Each of the matters of fact and the genuineness of each document of which admission is requested is admitted unless, within 28 days after service thereof, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which admission is requested or setting forth in detail the reasons why the party cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part.**

As the emphasized language in Supreme Court Rule 216, above, shows, if ComEd had concerns about the relevance or materiality of the admissions, then the time to raise them was within 28 days of service of the requests for admission. LAZ Parking served ComEd with the subject requests for admission on October 5, 2012. A lot more than 28 days have passed since then.

ComEd relies on *Rath v. Carbondale Nursing and Rehabilitation Center, Inc.* 374 Ill. App. 3d 536 (5th Dist. 2007), *Serrano v. Rotman*, 406 Ill. App. 3d 900 (1st Dist. 2011) and *Smith v. Pavlovich*, 394 Ill. App. 3d 458 (5th Dist. 2009) as support for contesting its own judicial admissions in its Motion for Summary Judgment. None of these cases support ComEd's position. In *Rath*, the defendant sought to prevent the plaintiff from presenting evidence of negligent conduct because the defendant had admitted negligence in its response to a request for admission. *Rath*, 374 Ill. App. 3d, 537-39. However, the defendant had only admitted negligence

during the last week of the plaintiff's residency in the nursing home. *Id.* at 539. The court upheld the admission of additional evidence on negligence, stating that "a judicial admission may be cleverly made with grudging limitations or evasions... so as to be technically but not practically a waiver of proof." *Id.* (citing 9 Wigmore, Evidence, Section 2591 (1981)). ComEd's Supreme Court Rule 216 admissions are quite the opposite: there are no "grudging limitations or evasions" to be found in them.

*Serrano v. Rotman* concerned the admission of additional evidence at trial where an earlier judicial admission was found to be ambiguous at trial. *Serrano*, 406 Ill. App. 3d at 906-909. Similarly, *Smith v. Pavolovich* is completely irrelevant to this case because the plaintiff there sought to make certain admissions in the defendant's answer to the complaint judicial admissions. No request for admissions under Supreme Court Rule 216 was involved.

Without limiting the foregoing, LAZ Parking also incorporates by reference as if fully set forth at this place, all of Section III.A of its Motion to Clarify and Strike.

Accordingly, LAZ Parking moves to strike the following portions of ComEd's Motion for Summary Judgment:

1. Page 2, second full paragraph (beginning "The Commission will see that LAS has complicated the record...") through page 3, end of carryover paragraph.
2. Page 2, footnote 2, in its entirety.
3. Page 3, third full paragraph, numbered subparagraph "1" stating: "The under-billing of LAZ...arose from a defaulted meter constant in the billing software – and not from any inaccuracy in the meter. (Count II)" in its entirety.
4. Page 3, last full paragraph, to top of page 4, carryover paragraph, sentence reading: "Given its own vast technical expertise and experience, the Commission will know that an [sic] defaulted meter is nothing other than a billing error and, as such, falls under the dictates of Part 280" in its entirety.
5. Page 4, top, sentence stating: "Thus, it will reject outright those 'admissions' that muddle the record with technically illogical and untrue statements."



6. Page 10, clause: "...and his expertise shows that a meter constant has nothing to do with the meter itself, i.e., it is not a meter function."
7. Page 11, second full paragraph, in its entirety.
8. Page 12, second paragraph, in its entirety.
9. Page 12, third paragraph, in its entirety.
10. Page 15, first paragraph, first sentence, clause reading: "Due to the incorrect meter constant of '1' having been in the billing system..."
11. Page 16, first full paragraph, in its entirety.
12. Page 16, footnote 8, in its entirety.
13. Page 17, Section 7 "Summary," first sentence, beginning "All of the above description shows..." in its entirety.
14. Section IV, pages 19 through 30, including all footnotes, in their entirety.

Likewise, given ComEd's First Motion to Dismiss, its Second Motion to Dismiss, and now its Motion for Summary Judgment, it appears that no pleading or other filing by ComEd will be complete without another ham-fisted attempt by ComEd to re-litigate its Rule 216 judicial admissions. Accordingly, LAZ Parking requests an order that to prohibit ComEd from placing those admissions in controversy in any future filings in this Docket.

#### **IV. Motion to Strike Portions of Affidavits of ComEd's Witnesses**

##### **A. Portions of the Rumsey Affidavit Violate Supreme Court Rule 216 and Must Be Stricken**

ComEd's Rule 216 Admission No. 4 states that "Meter Number 141362866 was programmed with an incorrect meter constant." (ALJ Order of February 13, 2014, page 5).

ComEd cannot put its judicial admissions in controversy, whether directly in its Motion for Summary Judgment or in an affidavit it uses to support that motion. Therefore, LAZ Parking moves to strike the following portions of the affidavits of ComEd witness Mr. Rumsey:

1. Rumsey Affidavit, ComEd Exhibit A, par. 7, first sentence reading: “The meter constant/multiplier is not something that is programmed into ComEd’s meters” and last sentence reading: “In short, the meter constant/multiplier is not a meter function.” These statements impermissibly place in controversy ComEd’s judicial admission 4 (see ALJ Ruling of February 13, 2014, pg. 5, a copy of which is attached as Exhibit B to this Motion).
2. Rumsey Affidavit, ComEd Exhibit A, par. 9, last sentence, clause: “...because a constant/multiplier is not something that is programmed into ComEd’s meters.” This language must be stricken for the same reason as the preceding item 1.
3. Rumsey Affidavit, ComEd Exhibit A, par. 11, last sentence reading: “Stated yet another way, a “meter constant” resides in the billing system and not in a meter.” This language must be stricken for the same reason as the preceding item 1.

**B. Portions of the Rumsey Affidavit Violate Supreme Court Rule 191 and Must Be Stricken.**

Section 2-1005 of the Code of Civil Procedure sets forth the requirements for motions for summary judgment, 735 ILCS 5/2-1005. In particular, Section 2-1005(e) provides that “the form and contents of and procedure relating to affidavits under this Section shall be as provided by rule.” 735 ILCS 5/2-1005(e). Supreme Court Rule 191(a) is the rule that prescribes the form and contents of affidavits in support of or defending against motions for summary judgment.

As LAZ Parking made clear in the Motion to Clarify and Strike, an affidavit made in support of a motion for summary judgment must comply with the requirements of Supreme Court Rule 191(a). That rule provides, in relevant part, that

“[a]ffidavits in support of...a motion for summary judgment ... shall set forth with particularity the **facts** upon which the claim, counterclaim or defense is based...**shall not consist of conclusions but of facts** admissible in evidence....”

Ill. S. Ct. R. 191(a) (Emphasis added.) The first sentence of paragraph 11 of the Rumsey Affidavit states as follows:

The facts I stated above, show that neither meter testing nor any type of post-installation meter inspection would reveal the incorrectness of the LAZ or any other customer’s meter constant (as this is a matter based solely on the entry of

current transformer specifics and other information into ComEd's CIMS for billing purposes).

Here, Mr. Rumsey by his own words states a conclusion on the prior alleged facts in his affidavit. This is a conclusion, not a fact, and therefore must be stricken from the Rumsey Affidavit pursuant to Supreme Court Rule 191(a).

**C. Portions of the Spitz Affidavit Violate Supreme Court Rule 216 and Must Be Stricken.**

ComEd's Rule 216 Admission No. 4 states that "Meter Number 141362866 was programmed with an incorrect meter constant." (ALJ Order of February 13, 2014, page 5).

ComEd cannot put its judicial admissions in controversy, whether directly in its Motion for Summary Judgment or in an affidavit it uses to support that motion. Therefore, LAZ Parking moves to strike the following portions of the affidavits of ComEd witness Ms. Spitz:

1. Spitz Affidavit, ComEd Exhibit B, page 3 of 4, 8<sup>th</sup> full paragraph, clause reading "Due to the incorrect meter constant of '1' in the billing system".
2. Spitz Affidavit, ComEd Exhibit B, page 4 of 4, first full paragraph, sentence reading: "This difference came about because the meter constant in ComEd's billing systems – after the December 14, 2007 meter change – did not have the necessary CT data inputs and so defaulted to '1'."

**V. Motion to Strike the Schedule on ComEd's Motion for Summary Judgment**

On May 29, 2015, the ALJ set a schedule for the filing of briefs on ComEd's Motion for Summary Judgment, with the date for LAZ Parking's response due on July 31, 2015. However, given ComEd's decision to renege on the undertaking it made at that status hearing, and in view of the issues that LAZ Parking has had to raise yet again concerning ComEd's violation of Rule 216 and other material deficiencies in ComEd's Motion for Summary Judgment, LAZ Parking hereby moves the Commission to continue generally the hearing on ComEd's Motion for

Summary Judgment pending the resolution of the issues raised in this Motion by LAZ Parking. In addition, given the other allegations made in ComEd's affidavits, LAZ Parking will require additional time to obtain counter-affidavits, conduct additional discovery and depose ComEd's witnesses.

**VI. Conclusion**

Wherefore, LAZ Parking respectfully requests the Commission to enter an order:

1. Reaffirming that ComEd's Rule 216 admissions are judicial admissions and are incontrovertible by ComEd;
2. Striking from ComEd's Motion for Summary Judgment and its supporting affidavits those portions thereof identified in this Motion;
3. Prohibiting ComEd from placing its Rule 216 admissions in controversy in any pleadings or other filings in this Docket;
4. Striking the briefing schedule originally established for ComEd's Motion for Summary Judgment pending resolution of the issues raised by this Motion, and to allow LAZ Parking time to obtain counter-affidavits, conduct additional discovery and depose ComEd's witnesses; and
5. For such other relief as the Commission deems just and proper.

Dated this 13th day of July, 2015

Respectfully submitted,

**By : Paul G. Neilan**

Paul G. Neilan  
Law Offices of Paul G. Neilan, P.C.  
33 North LaSalle Street  
Suite 3400  
Chicago, IL 60602  
312.580.5483 Tel  
312.674.7350 Fax  
[pgneilan@energy.law.pro](mailto:pgneilan@energy.law.pro)

Attachments:

Exhibit A -- February 13, 2014 ALJ Ruling Granting LAZ Parking's Motion to Deem Admitted

Exhibit B – Transcript of May 29, 2015 Status Hearing